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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

PEDRO WILLIAM BACA,

Defendant and Appellant.

C043828

(Super. Ct. No.
01F07786)

Although the participants in the events culminating in the shooting of a young Hispanic man dressed like gang members, threw gang signs, sported gang tattoos, affiliated with gang members, and wore gang colors, they insist they are not members of a gang. Nevertheless, the case has all the indicia of gang conflict: perceived disrespect, a fight, and a shooting. Following a joint trial with codefendant Rocky Gonzalez, a separate jury convicted defendant Pedro William Baca of murder (Pen. Code, § 187, subd. (a)),¹ attempted murder (§§ 664, 187,

¹ All further statutory references are to the Penal Code.

subd. (a)), and assault with a deadly weapon (§ 245, subd. (a)(1)) for his participation in a fight on September 28, 2001, and the shootings that followed. We affirm.

I

SUFFICIENCY OF THE EVIDENCE

Defendant's lifelong friend, John Medina, testified that he saw defendant shoot at the victim, Anthony Garnica. Medina was the only witness to the shooting. He therefore was subjected to a searing cross-examination, during which the defense exposed his motive to lie, his propensity to lie, and his history of lying. On appeal, defendant contends there was insufficient evidence to connect him with the commission of the charged offenses independent of his accomplice's testimony. The theory of the defense was that Medina, not defendant, shot the victims.

The law is straightforward. We must affirm a jury conviction if, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578.) As defendant acknowledges, we must draw all reasonable inferences in favor of the judgment, including issues related to the credibility of witnesses, and presume the existence of every fact the trier of fact could reasonably deduce from the evidence. (*Id.* at pp. 576-577; *People v. Barnes* (1986) 42 Cal.3d 284, 303-304.)

Nevertheless, the testimony of an accomplice requires corroboration. (§ 1111.) "To corroborate the testimony of an accomplice, the prosecution must produce independent evidence which, without aid or assistance from the testimony of the

accomplice, tends to connect the defendant with the crime charged. [Citation.]"" (*People v. Martinez* (1982) 132 Cal.App.3d 119, 132.) The requisite corroboration may be slight, circumstantial, and entitled to little consideration when standing alone. (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1128.) But it must implicate the defendant by connecting him to some act or fact that is an element of the crime. (*Ibid.*) Connecting him to the perpetrators alone is not enough. (*People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543.) "On the other hand, unless a reviewing court determines that the corroborating evidence should not have been admitted or that it could not reasonably tend to connect a defendant with the commission of a crime, the finding of the trier of fact on the issue of corroboration may not be disturbed on appeal." (*Ibid.*)

With these legal principles in mind, we summarize the dispositive facts. After finishing work at his family's restaurant about 7:00 p.m., Garnica and his coworker, Lee Ward, walked to a Quik Stop market, where they met another friend, Jesus Avila. Garnica's girlfriend, their son, and another child drove into the lot. Garnica gave his girlfriend money to buy alcohol. As she did what she was told, she encountered Medina, Gonzales, and defendant, one of whom spoke to her and thus provoked Garnica. He stated, "'Shut up, she's mines [*sic*].'" Medina retorted, "'Who the fuck you telling to shut up?'" He also asked Garnica if he was a "scrap," a derogatory gang term referring to members of a Hispanic gang associated with Southern California. At some point, Medina grabbed the beer bottle

Garnica was holding. Eventually, Medina apologized to Garnica for approaching his girlfriend and the two of them shook hands. Defendant did not appear to be involved in the argument.

Gonzalez, Medina, and defendant bought their beer and left, although there is conflicting testimony as to whether defendant rode in the cab or the bed of the truck or whether he left on foot. Medina testified that he could not find defendant and they drove to defendant's house looking for him. All the witnesses agree that a few minutes later, Gonzalez and Medina got into a fight with Garnica and Ward. During the fight, someone shot Garnica and Ward. Ward testified he did not see the shooter, but he did not see defendant during the fight. Ward recovered; Garnica did not. The cause of death was a distant-range gunshot wound to the lower back.

Medina testified that Garnica and Ward jumped him, they exchanged blows, he heard a gunshot, and then he saw defendant walk around the corner with a black revolver in his hand. Defendant, according to Medina, then shot at Garnica.

The prosecution stipulated the immunity agreement with Medina had been withdrawn because he had not been truthful during the preliminary hearing. Moreover, defense counsel exposed a series of lies Medina told during the investigation and prosecution of the charges. Medina insisted he was not a member of a gang despite photographs showing him throwing gang signs with other gang members, his red attire, his friendship with known gang members, and his use of gang terminology.

Avila testified that the shooting occurred just a few minutes after the first altercation. After everyone left, he spoke to the owner of the Quik Mart for four or five minutes and then drove down Franklin Boulevard. He saw Garnica face down on the ground and drove to the restaurant to inform Garnica's parents. He estimated that no more than three to six minutes elapsed between the time the victims left the store and the time he saw Garnica on the ground.

Defendant had broken off his relationship with his girlfriend, Jessica Morales, a day or two before the shooting. Nevertheless, she visited him in prison about a hundred times. She testified that she was unable to remember much of anything because she smoked a lot of marijuana every day. During the investigation, she told a police officer that she spoke to defendant on the telephone six days after the shooting. He tearfully told her that he wanted to hold her once more because he had done something wrong and he was going to be gone for a long time. The meaning of defendant's statement was hotly contested at trial. The prosecution argued the statement was a blatant admission of guilt; defendant shot Garnica and was on the run. The defense argued that defendant admitted not to the shooting of Garnica, but to shooting at an inhabited dwelling. At the time of the telephone conversation, Morales did not know about the homicide. She believed defendant had shot at a relative's house. But during the conversation, she repeatedly told defendant not to tell her what he had done wrong or why he would be gone for a long time.

Morales also testified that defendant brought home a gun when they lived together. A .32-caliber cartridge was found beneath defendant's couch and the slug taken from Garnica's body was also a .32-caliber. Defendant's apartment was across the street from the shooting.

Defendant insists that the corroborative evidence, independent of Medina's identification, is insufficient to sustain the verdict. But he inflates the quantum of evidence necessary and confuses our role with that of the jury.

Defendant does not dispute that he arrived at the Quik Mart with Medina and Gonzalez a few minutes before the shooting. Thus, he was present during the provocative confrontation. Moreover, Avila testified that defendant would not allow him to approach Garnica when the argument began. While perhaps he was not the initial antagonist, he aligned himself with his friends, both of whom were attired in standard gang issue: white t-shirts, khaki or black pants, red accessories, and tattoos. While Morales insisted, to the extent she had any recall, that she had kept him from hanging out downtown with gang members, defendant too had a gang tattoo emblazoned on his chest.

A gang expert educated the jury on the nuances of the gang subculture, in which members are bound to defend one another, particularly when a comrade is shown disrespect. Hence, the jury learned that in defendant's milieu, disrespect begets violence and revenge is a communal responsibility. Hence, the jury was free to draw the reasonable inference that defendant,

loyal to a gang code of honor, sought to avenge those who disrespected his "homeboy."

The inference was bolstered by two independent facts: defendant owned a gun and he lived in close proximity to the shooting. The jury could have concluded that defendant retrieved his gun from his apartment down the street from the Quik Mart and, seeing his friends engaged in the fight with Garnica and Ward, fired two or three shots. The slug found in his apartment was the same caliber as the bullet removed from the victim's body.

And finally, the jury may have accepted the prosecution's argument that defendant's conversation with Morales constituted an admission of guilt. The prosecution argued it was ludicrous to suggest that defendant was referring to the shooting of a relative's house given that the day following the shooting he remained in Sacramento socializing with friends but six days later fled and all of a sudden realized he had done something terribly wrong and would be away for a long time.

Defendant reargues the weakness of the corroborative evidence, pointing out that the .32-caliber bullet is very common and the bullet found at defendant's house was not an exact match. He insists, "By itself, the slug certainly cannot connect [defendant] to the commission of the crime, any more than it would connect anyone who owned a .32 caliber pistol with Smith & Wesson ammunition to the commission of the crime." He also claims that his statement to Morales is too ambiguous to connect him to the shootings.

But it was the jury's prerogative to find otherwise. While the jury must consider the corroborative evidence independent of the accomplice's testimony, it is free to consider the cumulative impact of the evidence even if that evidence is circumstantial. We conclude that defendant's affiliation with Medina and Gonzalez minutes before the shooting, in the context of the gang culture; when considered with his ownership of a gun, his access to it, and the similarity of the ammunition to the bullet from the victim; and bolstered by his admission, constitutes sufficient corroboration of Medina's testimony. We are not at liberty to disturb the jury's finding of corroboration since this evidence does tend to connect defendant with the crime.

II

A more troubling issue is the trial court's failure to instruct the jury to begin deliberations anew once an alternate juror replaced another juror. (*People v. Collins* (1976) 17 Cal.3d 687, 693-694 (*Collins*).) Since the failure to instruct constitutes clear *Collins* error, the issue is whether the error is harmless. We conclude it is.

The jurors began their deliberations at 2:55 p.m. on the 17th day of trial and recessed an hour and 20 minutes later. The next morning, they resumed their deliberations for an hour and a quarter before sending the judge the following note: "At this point in time, it is apparent to the jurors that we will probably not come to a decision by c.o.b. Monday. We have a juror who was told he would be done Monday. We request that

we bring in our alternate to prevent having to start the deliberation process over." There being no objection, the juror was excused and the last alternate was sworn to try the cause. According to the court's minutes, "The jury returned to the jury room to commence with their deliberations." During the initial two hours and 35 minutes of deliberations, the jury made no other inquiries, nor did it request the rereading of testimony or the review of any exhibits.

The deliberations proceeded for seven days. The jury made a total of nine inquiries about the evidence and the meaning of various instructions. The record is otherwise silent regarding the deliberations. A unanimous jury found defendant guilty on all counts and all enhancements. Defendant argues that the length of the deliberations suggests the case was close and the two and one-half hours of deliberations before the substitution was ample time for individual jurors to have voiced strong opinions and to have come to some preliminary conclusions about the case.

In *Collins* itself, the Supreme Court found the error harmless, rejecting the notion that the failure to instruct the jury to begin their deliberations anew constituted reversible error per se. "Certainly there appears no reasonable probability that a more favorable verdict would have been returned had the jury been properly instructed following the substitution. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243] [(*Watson*)].)" (*Collins, supra*, 17 Cal.3d at p. 697.) Defendant does not challenge the applicability of the

Watson assessment of prejudice. Rather, he contends that there is a reasonable probability he would have been acquitted had the jury been properly instructed. We disagree.

A comparison of the time spent deliberating before and after the substitution of the juror is a factor to be considered in assessing prejudice. (*People v. Odle* (1988) 45 Cal.3d 386, 405 (*Odle*).) In *Collins*, the jury had deliberated for a little more than an hour before the juror was substituted and proceeded to deliberate several hours before returning a verdict. Similarly, in *Odle*, the jury had deliberated for part of an afternoon before the substitution, and the newly constituted jury went on to deliberate for an additional two and one-half days before returning a verdict. The court found the *Collins* error harmless. And in *People v. Proctor* (1992) 4 Cal.4th 499 (*Proctor*), the jury deliberated less than one hour prior to substitution of the alternate and continued to deliberate for two and one-half days thereafter. Again, the Supreme Court found it was not reasonably probable that the outcome of the trial would have been more favorable to the defendant if the jury had been properly instructed. (*Id.* at pp. 537-538.)

By contrast, in *People v. Renteria* (2001) 93 Cal.App.4th 552, a reconstituted jury returned a verdict after only 30 minutes of deliberations. Before the alternate juror was seated, the jury had deliberated for some hours. The court observed that "[t]he jury had reported itself at impasse, unable to reach a verdict, at almost the same time the ill juror said she could not continue to serve that afternoon, and was

discharged for that reason.” (*Id.* at p. 561.) Under these circumstances, the court found the error prejudicial. (*Ibid.*)

Here, like *Collins*, *Proctor*, and *Odle*, the jury deliberated a very short time before the alternate was substituted and a comparatively long time thereafter. In fact, the reconstituted jury deliberated a full seven days and asked the court a total of nine questions during those deliberations. Given that the jury would have spent some portion of the initial two and one-half hours selecting a foreperson, we cannot say it is reasonably probable that the jury had engaged in such meaningful deliberations or that individual jurors had made up their minds that defendant was deprived of the full participation of 12 open-minded jurors during the seven days of deliberations that followed. More specifically, we conclude it is not reasonably probable that defendant would have been acquitted if the court had properly instructed the jurors to begin their deliberations anew.

Yet defendant insists the error was prejudicial because the case was so close. We agree that the evidence is not as strong as in *Collins*, *Proctor*, and *Odle*. The only witness to identify defendant as the shooter was his accomplice, John Medina, and the corroborative evidence, while sufficient, was not overwhelming. Nevertheless, the evidence was not so weak as to shake our confidence in the deliberative process given the length of time the reconstituted jury deliberated and the number of incisive questions the jurors posed.

In this regard, we must part company with our brethren in the Second Appellate District. In *People v. Martinez* (1984) 159 Cal.App.3d 661 (*Martinez*), the jury, as here, deliberated for a little more than two hours before an alternate juror was substituted and for six days thereafter. The court concluded that in a close case a little more than two hours was "sufficient time to formulate the danger that is likely without the proper instruction." (*Id.* at p. 666.) Two hours may be sufficient time, but we do not believe it is reasonably probable that a jury given six or seven days to deliberate would reach a different outcome if only they had been instructed to start their deliberations anew. Absent some other evidence in the record, we conclude that the comparison of the time spent deliberating before and after the jury is reconstituted is a much more formidable factor than the closeness of the case. *Martinez* offers no persuasive rationale for inferring prejudice from lengthy deliberations. Rather, we conclude that the length of the deliberations following the substitution suggests the jurors did deliberate in earnest and carefully considered the conflicting evidence. Unlike the court in *Martinez*, we cannot say the error was prejudicial.

Nor does the content of the juror's request convince us otherwise. Defendant emphasizes that the jury sought to avoid its essential obligation; that is, to start deliberations anew once the alternate was seated. Our response is twofold. First, the note itself is somewhat ambiguous. Contrary to defendant's assertion, the jurors may have realized that a change in

membership would require fresh deliberation, and therefore, because they had barely begun, they asked to seat the alternate before lengthy deliberations were wasted. Second, even if the jurors mistakenly believed that given the brevity of their deliberations they were not required to start over, we find it is not reasonably probable that a proper instruction would have affected the outcome of the deliberations.

III

Defendant and Gonzalez were charged with assault with a deadly weapon. The prosecutor argued that Gonzalez threw a beer bottle at Ward and defendant was guilty of assault with a deadly weapon as an aider and abettor. Gonzalez was convicted of misdemeanor assault. Defendant argues the verdicts are inconsistent and asserts that he cannot be convicted of a crime greater than the principal. He urges us to reduce his conviction of assault with a deadly weapon to misdemeanor assault. We disagree.

In fact, our system of justice does tolerate inconsistent verdicts by separate juries. Our Supreme Court has abandoned the so-called rule of consistency, which requires virtually automatic reversal of an inconsistent verdict. In *People v. Palmer* (2001) 24 Cal.4th 856, 865, Justice Chin wrote: "Our criminal justice system, which permits a conviction only if the jury unanimously finds beyond a reasonable doubt that a defendant is guilty of the particular charge, gives the defendant the benefit of the doubt. Moreover, a jury clearly has the unreviewable power, if not the right, to acquit whatever

the evidence. An inevitable result of this system, and one that society accepts in its quest to avoid convicting the innocent, is that some criminal defendants who are guilty will be found not guilty. This circumstance does not, however, mean that if one person receives lenient treatment from the system, all must." (See also *People v. Lawley* (2002) 27 Cal.4th 102, 163-164.)

Relying principally on *People v. Antick* (1975) 15 Cal.3d 79 (*Antick*) and *People v. Allsip* (1969) 268 Cal.App.2d 830 (*Allsip*), defendant contends he cannot be convicted of assault with a deadly weapon when the perpetrator himself was not. He discounts the significance of the separate juries, claiming that the same evidence as to the assault was presented to both juries. We conclude that separate juries can, and in fact did, draw different inferences from the same facts. While one jury concluded that the manner in which the beer bottle was thrown constituted assault with a deadly weapon, the second jury found only a simple assault. As our Supreme Court has recognized, inconsistency is often a tolerable outcome in our system of justice. Unlike our case, neither *Antick* nor *Allsip* involved separate juries.²

² Moreover, the Supreme Court has disapproved *Antick* and *Allsip* to the extent either conflicts with *People v. McCoy* (2001) 25 Cal.4th 1111, 1123.

IV

Defendant challenges the constitutionality of CALJIC No. 2.90 on both due process and equal protection grounds. His due process challenge has been "conclusively settled adversely to defendant's position." (*People v. Hearon* (1999) 72 Cal.App.4th 1285, 1287.) His equal protection challenge is also unavailing.

Defendant claims a result contrary to *Hearon* is now required by the United States Supreme Court's decision in *Bush v. Gore* (2000) 531 U.S. 98 [148 L.Ed.2d 388] (*Bush*). Not so. In *Victor v. Nebraska* (1994) 511 U.S. 1 [127 L.Ed.2d 583] (*Victor*), the Supreme Court held: "The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so" (*Id.* at p. 5.) In *Bush*, the court did not purport to reject *Victor*, nor did it hold that trial courts must define reasonable doubt. It is fundamental that a case is not authority for an issue neither raised nor considered. (*People v. Wells* (1996) 12 Cal.4th 979, 984, fn. 4.)

Rather, in *Bush*, the court majority carefully distinguished the election contest before it from the ordinary case in which a jury evaluates evidence at a criminal trial. In the election contest, "[t]he factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment." (*Bush, supra*, 531 U.S. at p. 106.) Here, in contrast, the factfinder was confronted by live

witnesses and had to decide whether to believe them. Defendant does not argue that the assessment of credibility can be confined by a series of specific rules, as in *Bush*. Nor does *Bush* suggest that the next step in the process, the determination whether the facts found by the trier of fact establish guilt beyond a reasonable doubt, is "susceptible to much further refinement" through "specific rules designed to ensure uniform treatment." (*Ibid.*)

Simply put, settled case law approves the definition of reasonable doubt as articulated in CALJIC No. 2.90. Since the same definition is provided to all juries in criminal cases in the State of California, there is no arbitrary distinction made in the instruction, and thus CALJIC No. 2.90 does not offend equal protection.

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

SCOTLAND, P.J.

MORRISON, J.